Supreme Court, U.S.
FILED
OCT 2 1997
CLERK

(2)

No. 97-208

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

National Academy of Sciences,

Petitioner,

v.

Animal Legal Defense Fund,
Psychologists For The Ethical Treatment
Of Animals, And Association Of
Veterinarians For Animal Rights,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF AMICI CURIAE SUBMITTED BY 84 PROMINENT SCIENTISTS IN SUPPORT OF PETITIONER

Frederick R. Anderson*
Daniel D. Barnhizer
Cadwalader, Wickersham & Taft
1333 New Hampshire Ave., N.W.
Washington, DC 20036
(202) 862-2200

Attorneys for Amici Curiae
*Counsel of Record

October 3, 1997

42 pp

QUESTIONS PRESENTED

1. Is certiorari warranted to review a court of appeals' decision that misinterprets *Public Citizen* and holds that the nation's leading scientific institution must comply with the Federal Advisory Committee Act?

2. Did the Court in *Public Citizen* misconstrue the role committees play in Academy scientific studies, thereby leading the court of appeals to misapply dicta in *Public Citizen* and cripple the ability of the Academy to provide independent, objective analyses for the use of Congress, agencies, the courts, states, and international bodies?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

STATEMENT OF INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 2

THE NATURE OF THE NATIONAL ACADEMY OF SCIENCES 3

REASONS FOR GRANTING THE PETITION 7

I. From Beginning to End, the Academy Process Is Incompatible with the Mandates of FACA 8

A. The Academy's Primary Role in the Initiation of Studies is Inconsistent with FACA 9

B. The Academy's Selection of a Committee is the Antithesis of Committee Selection under FACA 10

C. To Ensure Scientific Objectivity, Academy Committee Meetings Are Conducted in a Manner Inconsistent with FACA's Mandates 12

D. The Academy's Review of Study Drafts Goes Well Beyond Any Requirements of FACA to Ensure Accuracy and Objectivity 15

II. The Court of Appeals Erred by Applying Dicta in *Public Citizen* as Controlling 17

CONCLUSION 20

List of Amici Curiae A-1

TABLE OF AUTHORITIES

CASES

Page

Animal Legal Defense Fund v. Shalala,
114 F.3d 1209 (D.C. Cir. 1997) 11

Animal Legal Defense Fund v. Shalala,
104 F.3d 424, *reh'g en banc denied*, 114 F.3d
1209 (D.C. Cir. 1997) 2

Animal Legal Defense Fund v. Shalala, No. 94-1003,
mem. op. (D.D.C. Dec. 20, 1996) 19

Lombardo v. Handler, 397 F. Supp. 792
(D.D.C. 1975), *aff'd mem.*, 546 F.2d 1043
(D.C. Cir. 1976), *cert. denied*, 431 U.S. 932 (1977) 10

Public Citizen v. United States Dep't of Justice,
491 U.S. 440 (1989) ..... passim

Washington v. Buckner, 941 P.2d 667
(August 14, 1997) (*en banc*) 6

STATUTES AND REGULATIONS

Page

Federal Advisory Committee Act ("FACA"), 5 U.S.C. App. II ..... passim

§ 5(b)(2) 11

§ 10(a)(1) 13

§ 10(a)(2) 13

§ 10(b) 13

§ 10(c) 13

§ 10(e) 13

§ 10(f) 13

42 U.S.C. § 288b(b)(2) (1994) 10

MISCELLANEOUS

Page

Norman R. Augustine, *When Politics Interferes with Science*, Washington Post, August 6, 1997, at A19, col 1 14

Marian Burros, *U.S. Will Focus on Reducing Pesticides in Food Production*, N.Y. Times, June 27, 1993 at 1, col 5 4

Executive Order No. 12832, 3 C.F.R. 580 (1993), *reprinted in* 36 U.S.C. § 253 n. (1994) 19

Steven Findlay, *AIDS: Education Can Curb the "Epidemic,"* USA Today, November 6, 1986, at D-4, col 1 4

H.R. Rep. No. 91-1731 (1970) 18

Hearings on H.R. 4383 before the Subcommittee on Legal and Monetary Affairs of the House Committee on Government Operations, 92nd Cong., 1st Sess. (November 4, 1971) 19

Institute of Medicine, National Academy of Sciences, *Confronting AIDS: Directions for Public Health, Health Care, and Research* (1986) 4

National Academy of Sciences, *The Management and Disposition of Excess Weapons Plutonium* (1994) 6

National Academy of Sciences, et al., *The Policy Partnership with the U.S. Government* (1988) 7, 9

National Academy of Sciences, *Questions and Answers About the National Academy of Sciences, National Academy of Engineering, Institute of Medicine, and the National Research Council* (1991) 17

National Academy of Sciences, et al., *A Unique National Resource* (1994) 19

National Research Council, *The Evaluation of Forensic DNA Evidence* (1996) 5

National Research Council, *Modernizing the U.S. Census* (1994) 5

National Research Council, *Pesticides in the Diets of Infants and Children* (1993) 4

National Research Council, *Post-Challenger Evaluation of Space Shuttle Risk Assessment and Management* (1988) 4

Joseph Palca, *Academies Demand Urgent Public Education*, 324 Nature 3, Nov. 6, 1986 5

Prudence, Not Panic, on Pesticides, Chicago Tribune, July 24, 1993 at 18, col 1 (editorial) 4

NBC Nightly News, (NBC television broadcast, June 27, 1993) 4

Daniel Puzo, *Report Calls for Reform of Pesticide Regulations*, L.A. Times, July 8, 1993 at H-7, col 1 4

Stern Voice on AIDS, L. A. Times, Nov. 3, 1986,
at Pt. 2, p. 4, col 1 (editorial) 5

Richard Stewart, *The Reformation of American Administrative Law*,
88 Harv. L. Rev. 1667 (1975) 11, 14

STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

Amici curiae are 84 prominent American scientists, physicians, and engineers, including 58 Nobel Laureates, two former Cabinet members, four former science advisers to the President, and 15 former high federal officials. *Amici* are named in the attached List of *Amici Curiae*. *Amici* have served on Academy committees, boards, and commissions, including the Academy's Report Review Committee and the Academy's Governing Board. *Amici* have provided anonymous peer reviews of draft studies through the Academy's internal report review process. Several *amici* have played prominent roles in the federal government, which is a beneficiary of Academy studies. Most *amici* are elected members of the National Academy of Sciences, the National Academy of Engineering, or the Institute of Medicine. The description of the Academy process set out in this brief is based on *amici's* direct experience with the Academy process.

Through association with the Academy, *amici* have insights that may aid the Court in determining whether the questions presented are of sufficient importance to warrant review by this Court. *Amici* have filed this brief in support

---

[1] Pursuant to Supreme Court Rule 37, the following parties have contributed financially to the preparation of this brief: The Robert Wood Johnson Foundation, the American Association for the Advancement of Science, the Salk Institute, the Marine Biological Laboratory, the Southwest Foundation for Biomedical Research, the Carnegie Institution of Washington, the Chemical Manufacturers Association, the Pharmaceutical Research and Manufacturers of America, the American Physical Society, the Association of American Medical Colleges, Cold Spring Harbor Laboratories, and the Fred Hutchinson Cancer Research Institute. Counsel for a party did not author this brief in whole or in part.

of the petition for a writ of certiorari because they believe that the decision of the United States Court of Appeals for the District of Columbia Circuit, if left to stand, will undermine the important role the Academy has historically played in providing scientific studies to the government, scientific and educational institutions, and other private and public stakeholders.

SUMMARY OF ARGUMENT

Certiorari should be granted to avoid impairing the Academy's ability to provide independent, objective studies on scientific and technical issues of national and international importance. The Academy petitions for a writ of certiorari because the D.C. Circuit misapplied the Court's reasoning in *Public Citizen v. Dept. of Justice, et al.*[2] by relying on dicta in that case as if they were controlling to hold that Academy committees must meet FACA's requirements.[3] *Amici* respectfully seek to clarify for the Court the purpose of the Academy and the carefully delineated role committees play in assisting the Academy in performing scientific studies for the federal government. *Amici* believe that their explanation of the Academy and its process for providing scientific information and guidance to federal agencies will convince the Court that Academy committees are not covered by FACA.

The Academy strictly separates its committees from the agencies that fund some of its work. The Academy

---

2 491 U.S. 440 (1989).

3 *Animal Legal Defense Fund v. Shalala*, 104 F.3d 424, *reh'g en banc denied*, 114 F.3d 1209 (D.C. Cir. 1997) (relying on Supreme Court's characterization in *Public Citizen* to find NAS is "quasi-public" organization and subject to FACA).

process requires its complete control over committee membership and agendas, independence from outside influence during committee deliberations, and peer review of the resulting report by a group of independent experts. FACA would require federal agency, not Academy, control over federally-funded committees and would inject the federal government into every aspect of committee meetings and deliberations, including approval of the creation of a committee, scope of inquiry, meeting agendas, and presentation of results. Certiorari is warranted, because if deprived of control over its committees and of independence from funding agencies, the Academy process would not survive application of FACA.

THE NATURE OF THE NATIONAL ACADEMY OF SCIENCES

The National Academy of Sciences enjoys an exceptionally high standing among domestic and international scientific organizations.[4] Honorific functions aside, the Academy's primary service is provision of scientific and technical studies on issues of national importance. The Academy performs studies no other presently existing institution can accomplish. The integrity of the Academy's procedures and the credibility, objectivity, and independence of its work are the Academy's principal strengths. These strengths have enabled the Academy to

---

[4] Today, the Academy complex consists of the National Academy of Sciences ("NAS"), the National Academy of Engineering ("NAE"), the Institute of Medicine ("IOM"), and the National Research Council ("NRC"). Hereinafter, reference to the Academy includes all four organizations, but especially the NRC and IOM, which are the two organizations most likely to propose that a committee be formed in aid of the performance of a study. The NAS, NAE, and IOM honor outstanding men and women of science, engineering, and medicine with elected membership.

serve the government and the public with distinction for over 130 years.

Academy reports are a clarifying force on issues that threaten to produce confusing and scientifically misinformed public debate. Six Academy studies illustrate the breadth of the contribution such studies make to scientifically sound resolution of important public issues. A 1993 Academy report addressed the potential risks to infants and children posed by pesticides in the nation's food supply.[5] Because it involved children's health, food safety, and significant economic impacts, this Academy study received extraordinary coverage in the press and television news media.[6] The Academy examined the safety of National Aeronautics and Space Administration's space shuttle rocket boosters in the wake of the 1986 Challenger accident which generated wide public debate over the pace of the nation's space exploration program.[7] The Academy addressed the science relevant to AIDS transmission, the dimensions of the AIDS epidemic, treatment, and public education in a major 1986 report.[8] Amidst controversy over the accuracy of the

---

[5] National Research Council, *Pesticides in the Diets of Infants and Children* (1993).

[6] See, e.g., Marian Burros, *U.S. Will Focus on Reducing Pesticides in Food Production*, N.Y. Times, June 27, 1993 at 1, col 5; Daniel P. Puzo, *Report Calls for Reform of Pesticide Regulations*, L.A. Times, July 8, 1993 at H-7, col 1; *Prudence, Not Panic, on Pesticides*, Chicago Tribune, July 24, 1993 at 18, col 1 (editorial); NBC Nightly News (NBC television broadcast, June 27, 1993).

[7] National Research Council, *Post-Challenger Evaluation of Space Shuttle Risk Assessment and Management* (1988).

[8] Institute of Medicine, National Academy of Sciences, *Confronting AIDS: Directions for Public Health, Health Care, and Research* (1986); Steven Findlay, *AIDS: Education Can Curb the*

U.S. Census, the Academy conducted a study that addressed whether a technically redesigned census that relied more heavily on estimates using certain sampling and statistical techniques might be more accurate and cost-effective than current methods.[9] Another, widely-anticipated Academy study confirmed that the scientific basis for the forensic use of DNA evidence is valid and recommended new ways of interpreting DNA evidence to assist judges and jurors in resolving how likely it is that two matching samples came from different persons.[10] Thus, courts as well as Congress and agencies benefit from Academy studies. The Supreme Court of Washington recently affirmed a murder conviction which it had previously reversed and remanded, based upon this Academy report.[11] An Academy report addressed

---

"Epidemic", USA Today November 6, 1986, at D-4, col 1; Joseph Palca, *Academies Demand Urgent Public Education*, 324 Nature 3, Nov. 6, 1986; *Stern Voice on AIDS*, L.A. Times, Nov. 3, 1986, at Pt. 2, p. 4, col 1 (editorial).

9 National Research Council, *Modernizing the U.S. Census* (1994).

10 National Research Council, *The Evaluation of Forensic DNA Evidence* (1996).

11 As the court stated:

> In 1993, this court accepted the proposition that an absolute identification of an individual could be made based upon DNA analysis provided that the technology exists to do so, because, except for identical twins, each individual's DNA is unique. *State v. Cauthron*, 120 Wash.2d 879, 900, 846 P.2d 502 (1993). At the time *Cauthron* was decided, we understood that this stage of technology would exist only when the entire DNA molecule could be compared to another entire DNA molecule. Id. It is now apparent that is not the case, as explained in the newest report of the National Research Council's Committee on DNA Forensic Science. That report...states: "The match probability computed in forensic

specific steps which could reduce the risks to international security posed by some 50 tons of excess plutonium contained in nuclear weapons to be dismantled under international agreements.[12] These six illustrative studies have in common a high degree of scientific and technical content on which the study depends, highly interested stakeholders with varying points of view, congressional, judicial, or executive agency need for scientific guidance, and a high level of public concern caused in part by controversy or confusion about the scientific bases for policies that may have been advanced to address the topic of study.

The credibility and usefulness of Academy studies are widely acknowledged, but exactly how the Academy prepares its studies has not been well understood by Congress, the courts, and the public. The Academy operates independently from its funding sources and diligently protects its internal processes. The Academy has developed each aspect of this process to ensure that its deliberations are insulated from funding organizations, that it produces scientifically accurate and impartial work, and that any final study meets high standards for quality, completeness, and objectivity. As the Academy has recognized:

> analysis refers to a particular evidentiary profile. That profile might be said to be unique if it is so rare that it becomes unreasonable to suppose that a second person in the population might have the same profile." National Research Council, Commission [sic] on DNA Forensic Science: The Evaluation of Forensic DNA Evidence 136 (1996).

Washington v. Buckner, 941 P.2d 667 (August 14, 1997) (*en banc*).

[12] National Academy of Sciences, *The Management and Disposition of Excess Weapons Plutonium* (1994).

> Although public officials seek objectivity and independence when they approach the [NRC] for assistance, many remain uncomfortable with the process because the recommendations of the study cannot be predicted. NRC procedures that ensure objectivity include the sole right by the Research Council to appoint committees, no release of findings and recommendations until the work has undergone internal NRC review, and conduct of work in executive session.

National Academy of Sciences, et al., *The Policy Partnership with the U.S. Government* 18 (1988) (hereinafter "*Policy Partnership*").

The Academy weighs existing scientific studies and renders "weight of the evidence" syntheses of available scientific knowledge. The Academy attempts to dispel ignorance about science and thus to create a framework for intelligent policy development. In this sense the Academy functions as an arbiter of the state of science on an issue using the processes of scientific analysis, discussion, and consensus. Its role is not to accommodate interests but to inform them. As scientists, *amici* are concerned that the court of appeals' decision may compromise the Academy's role by injecting a measure of federal control that is neither legally warranted nor compatible with the independent scientific analyses which the Academy provides.

REASONS FOR GRANTING THE PETITION

The Academy cannot reconcile its process with the fundamentally inconsistent mandates of FACA. FACA requires agency control over every aspect of its advisory committees, balancing of committee members' points of

view, and public committee meetings and records. These three mandates are the antithesis of four key components of the Academy process: independence from funding entities; selection of committee membership for scientific expertise; conduct of final committee deliberations free from external influence or pressure; and committee service, not to the federal government, but to the Academy itself. Without these elements, the Academy cannot produce the type or quality of studies it has performed for over 130 years.

I. From Beginning to End, the Academy Process is Incompatible with the Mandates of FACA

The Academy has refined a process over decades to provide answers that are as definitive as possible to scientific questions of national importance. In study development, the Academy and sponsoring agency agree on the study concept and negotiate terms. In the deliberations phase, the Academy may assemble a committee to generate a report on the issue to be studied. In this phase, the Academy controls the study, insulating it from interference by sponsors and interest groups. Finally, during anonymous peer review of committee drafts, the Academy's report review process, overseen by the Report Review Committee ("RRC"), invests considerable effort to ensure that reports issued in the Academy's name accurately present the state of science on the topic of study. This basic process antedates both the enactment of FACA and the case now before the Court, as well as the Court's 1989 decision in *Public Citizen*, although this process was not described or presented to the Court in *Public Citizen*.

A. The Academy's Primary Role in the Initiation of Studies is Inconsistent with FACA

The Academy begins by developing a study concept and statement of task. Study concepts may originate with agencies, but also with Congress, state and foreign governments, private entities, and the Academy's own oversight and governing entities. Academy staff consult with potential sponsors,[13] but the Academy controls the scope of the study and the mission of the committee. Academy staff prepare study proposals, which Academy commissions, boards, and the Governing Board (including, *inter alia,* the Presidents of the NAS, NAE, and IOM) may, as the instance requires, review, amend, reject, or approve. This review analyzes whether the issues are amenable to scientific and technical analysis, whether the issues have national application, whether the study will contribute to the national dialogue, and whether the study requires the unique abilities of the Academy. At any point, the Academy may reject a statement of task or study as inappropriate for Academy attention. The Academy and agency must then determine whether an alternative statement of task will satisfy the Academy's standards and the sponsor's needs.

The Academy enters into a contract, a grant, or cooperative agreement with sponsors to perform a study only

---

[13] Often more than one agency sponsors an Academy study. Some studies are partially or wholly supported by private organizations or with internal Academy funds. In such situations, the Academy must take a lead role in study development to secure consensus among several agencies with possibly differing policy goals. *See Policy Partnership* at 18. Similarly, the Academy may find itself in the lead role where studies overlap multiple administrations with differing policy goals, or in the face of changing federal funding priorities. *See id.* at 18-20.

after the Academy has approved the study.[14] Any funding agency understands that the committee is only a part, albeit an important part, of the Academy process to produce a study. Academy guidelines prohibit agency selection of committee members or alteration of Academy procedures. Only the Academy can propose the use of a committee structure, if warranted by Academy guidelines, to conduct a study. The Academy may refuse to conduct studies that do not meet its standards.[15] Once it executes a funding agreement with the Academy, agency oversight of the study ends, as it must, to ensure objectivity.

B. The Academy's Selection of a Committee is the Antithesis of Committee Selection under FACA

The Academy selects a study committee through consultations involving its standing boards and commissions, staff, Academy members, and professional colleagues. Naming the committee is the sole responsibility of the Academy. Nominations remain secret from the sponsoring agency until the Academy President makes the final selections and the nominees agree to serve. In contrast, FACA appears to require the sponsoring agency to identify potential committee members and then balance advisory

---

[14] Most grants and cooperative agreements are contractual in nature, i.e., they are *ad hoc*, study-specific agreements containing contract-like terms.

[15] *See, e.g.*, 42 U.S.C. § 288b(b)(2) (1994); *Lombardo v. Handler*, 397 F. Supp. 792, 794 and n. 12 (D.D.C. 1975), *aff'd mem.*, 546 F.2d 1043 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 932 (1977).

committee membership on the basis of "points of view" represented by the individuals identified. FACA §5(b)(2).[16]

Interest group balancing does not serve science; broad representation by scientific discipline does. Accommodation of interest groups in Academy committees would compromise the NRC's role as an objective arbiter of scientific fact. Respondents illustrate this point. They appear to desire representation on the Guide Review Committee for their particular moral, ethical, and political viewpoints. Interest group-based participation in committee deliberations would undermine the scientific objectivity and open-minded confrontation of issues that is necessary to serve national science policy needs.

Balancing committee memberships as FACA mandates would adversely affect the quality of scientific talent available to assess science relevant to federal policy making. This is because scientists, such as *amici*, while sometimes willing to serve on commissions balanced for interest group accommodation,[17] are far more willing to

---

[16] Application of this FACA requirement to all Academy committees may be somewhat uncertain, but if it were to apply it would undermine the open-minded examination of issues central to the Academy process. Circuit Judge Silberman maintains that because the balancing requirement is placed in a section of FACA that is separate from other FACA requirements for direct agency control of committees, and only applies to legislatively mandated committees or committees "creat[ed]" by a federal entity, that requirement does not apply to committees established exclusively by the Academy. *Animal Legal Defense Fund v. Shalala*, 114 F.2d 1209, 1210 n. 1 (separate statement by Circuit Judge Silberman concurring in the denial of rehearing *en banc*).

[17] For an explanation of the interest-group accommodation model of administrative law, see generally Richard Stewart, *The Reformation of American Administrative Law*, 88 Harv. L. Rev. 1667 (1975).

participate in scientific inquiry conducted by the Academy. Scientists serve on Academy committees out of obligation to a national scientific institution that "belongs to science," i.e., that is governed entirely by and for scientists, not the federal government. By joining an Academy committee, scientists expect to participate in a collegial enterprise, undiluted by political considerations, that allows free and candid scientific discussion, without fear of retaliation in the press, by a funding agency, or otherwise. *Amici* are often asked to serve on FACA advisory committees. They are thus well aware of the distinction between serving on an Academy committee and a FACA committee.

Committee members do not perceive themselves as working for a sponsoring agency, or as members of an agency FACA committee. Rather, they engage in scientific inquiry to explore the extent of current scientific knowledge and exfoliate the science and scientific issues involved for colleagues and the public. Many scientists, including *amici*, have donated their time and services because of the special qualities of Academy studies but have not otherwise served on government committees.

C. To Ensure Scientific Objectivity, Academy Committee Meetings are Conducted in a Manner Inconsistent with FACA's Mandates

Under Academy oversight, the committee meets to discuss the statement of task, address potential sources of bias, set its agenda, assign responsibilities to individual committee members, and perform the study. The committee may hold open informational meetings or request submissions from interested parties. Yet committee deliberations on findings and recommendations are conducted in executive session, and the committee is enjoined by the Academy from

releasing draft reports, working papers, or other indications of the committee's conclusions to outside parties. On occasion the Academy's Executive Officer has had to enforce this requirement. At the conclusion of its deliberations, the committee submits its confidential draft report to the Academy.

In contrast, the sponsoring agency sets a FACA committee's agenda. FACA §10(e). Only a government officer or employee may call meetings of FACA committees, and a government official with authority to adjourn the committee must attend each meeting. FACA §10(f). The FACA committee reports directly to its sponsoring agency. No superior authority insulates the committee from the agency and reviews its work. Indeed, FACA strives for precisely the opposite result.[18] FACA committees must hold all of their meetings in public, and the agency sponsor must publish notice of the meetings in the Federal Register. FACA §10(a)(1), (2). FACA committees must keep detailed minutes of meetings and make committee records available for public review. FACA §10(b), (c).

It is difficult to imagine how the Academy could both comply with FACA and still maintain the quality, independence, credibility, and timeliness of Academy studies. For example, the Academy's committee on the Challenger accident met 99 times over 30 months on highly technical but also highly controversial subjects to address rocket booster redesign and shuttle safety. Independence from NASA's direct control was essential for the credibility of the study. FACA's meeting notice and agenda requirements alone would have prevented the committee

---

[18] *See e.g., Public Citizen*, 491 U.S. at 457-59 (noting that Congress, in enacting FACA, sought to regulate more closely control of advisory committees by sponsoring agencies).

from meeting frequently or finishing its work as promptly as it did.[19]

In enacting FACA, Congress recognized the need to subject advisory committees to both public scrutiny and agency control to ensure that committee recommendations fairly represent the range of interests affected.[20] Yet, governmental control and premature scrutiny of an Academy committee's work would weaken the Academy's ability to provide objective scientific studies. Committee members must be free to explore candidly all lines of inquiry, subject to equally candid critiques by scientific peers. Public access to deliberative sessions and drafts would expose committee members to pressure from outside interest groups.

An Academy committee needs the freedom to change its conclusions and recommendations without embarrassment, based on comments received from the thorough peer review the Academy requires. Peer review usually results in some changes, and sometimes results in substantial modification or supplementation of a report. *Amici* know that committees have reversed their primary conclusions after receiving peer review comments through the Academy's report review process. A draft study of a controversial subject would be widely reported, creating the potential for confusion if peer review were to cause the Academy to revise the final report. The reality is that draft reports would be discussed in the press as if they were the soon-to-be-disclosed final conclusions of an Academy study, with the

---

[19] See Norman R. Augustine, *When Politics Interferes with Science*, Washington Post, August 6, 1997, at A19, col 1.

[20] *See e.g. Public Citizen* at 453 (noting FACA was enacted in part to prevent biased reports); *c.f.* Stewart, *supra* note 17.

Academy helpless to undertake the quality review that is essential to completed Academy reports.

Many committee members, all of whom donate their services to the Academy, depend on agency grants and other funding for their own research. The confidentiality of committee deliberations protects individuals from agency retribution for unpopular study results. Also, many agencies that fund the Academy administer regulatory statutes. Academy studies may affect the scientific underpinning of regulatory standards and enforcement policy. Confidentiality protects committee deliberations where a sponsoring agency's regulatory mission may be implicated.

While confidentiality serves to ensure both frank exchange and the quality of final reports bearing the Academy's imprimatur, *amici* point out that Academy committees conduct initial public meetings to gather information and hear stakeholder perspectives. Further, at the end of the process everyone knows what the Academy has said, and why. No danger exists that the public will be deprived of knowing all of the recommendations of an Academy study. Virtually all Academy reports are published, and many are marketed to and extensively used by the public. The report is the *only* means the Academy uses to respond to a federal request. The Academy requires its reports to contain adequate background so a reader can understand the scientific foundations for the Academy's conclusions.

D. The Academy's Review of Study Drafts Goes Well Beyond Any Requirements of FACA to Ensure Accuracy and Objectivity

The Academy process is far from complete when the committee submits its findings and recommendations to the

Academy. The Academy confidentially circulates the committee report to an anonymous external peer review panel selected by the RRC on the recommendation of the relevant oversight units. Anonymous peer review serves both to confirm the accuracy and objectivity of the committee's work, and to check any tendency to stray from the committee's charge or to favor a sponsor's point of view. The peer reviews remain permanently anonymous. In contrast, FACA does not provide for any review to validate a FACA committee's work.

The Academy RRC reviews the committee's final report to determine if the committee has adequately responded to the peer review comments. The Governing Board and presidents of the NAS, NAE, and IOM may become involved in the final approval of committee reports. *Amici* are unaware of any other institution that provides scientific guidance to government that so thoroughly insulates its studies from sponsoring agencies in order to guarantee accurate, independent work.

Finally, Committee members know that their deliberations, should they survive the Academy's intense review, will ordinarily be published by the National Academy Press. Publications are usually edited to produce book-length reports for general public use that provide self-contained "primers" on the consensus of the scientific community regarding issues with a high technical and scientific content. Committee members are thus rewarded for their labors with publication of a report that allows informed national dialogue. Whether the sponsoring agency seriously considers their conclusions matters to committee volunteers, but this consideration is of secondary importance to *amici* (and, presumably, most committee members) as compared to a report's scientific accuracy.

The hallmarks of the Academy process are its reputation for objective research of the highest quality, independence from its sponsors, mobilization of scientific talent otherwise unavailable to government,[21] and control over every aspect of its work. These qualities are essential to the Academy's ability to complete reliable and accurate studies of the state of scientific knowledge on issues of national concern, and are reflected in every step of the Academy process. Application of FACA will cripple the Academy process and end the Academy's 134-year tradition of providing government and the public with objective, accurate, and reliable analyses of scientific issues.

II. The Court of Appeals Erred by Applying Dicta in *Public Citizen* as Controlling

Amici agree with Petitioner that the court of appeals bases its assertion that the Academy is a "quasi-public entity" on this Court's perception of the Academy expressed in *Public Citizen* (Petition, p. 16). The Court's characterization of an Academy committee as "the paradigmatic example" of a directly utilized committee that advises agencies (*Public Citizen*, 491 U.S. at 460) indicates that the Court misconstrued the role Academy committees play in Academy studies. *Amici* submit that had the Court had before it the explanation *amici* provide here, it would not have used the Academy as an example at all.

---

[21] *Amici* point out that the NRC utilizes each year over 9,000 volunteer scientists, engineers, and other professionals in its committee system. The NRC committees represent over $27,000,000 in services provided at no cost to sponsors during the performance of studies. *See* National Academy of Sciences, *Questions and Answers About the National Academy of Sciences, National Academy of Engineering, Institute of Medicine, and the National Research Council* 15-16 (1991).

A House Report, drafted two years before FACA, noted: "A great number of the approximately 500 advisory committees of [the Academy] *possibly should be*" included under FACA. H.R. Rep. No. 91-1731, at 15 (1970) (emphasis added). The Report further noted that the Academy provides advice to government and that "[t]his is done by the use of advisory committees." *Id.* As explained above, it is the *Academy* that advises government after the Academy has approved a study, monitored committee deliberations, and scrutinized the committee report. The proposition that Academy committees directly advise government contradicts every element of the Academy process that insulates the committee's deliberations from governmental interference and ensures that a final report is the product of the Academy itself.

Amici further agree with Petitioner that FACA's legislative history illustrates that Congress did not intend to apply FACA to Academy committees. Throughout the legislative process culminating in FACA, no representative of the Academy was asked to testify, despite Congress' awareness of approximately 500 committees that reported to the Academy on scientific studies. *See* H.R. Rep. No. 91-1731 at 15. The Academy was a bystander to the enactment of FACA because it was not part of the problem.

In enacting FACA, Congress was concerned in part about the needless cost of advisory committees. *See, e.g., Public Citizen*, 491 U.S. at 453. *Amici* note that Academy studies may be expensive, but they are not "wasteful." Committee members — prestigious scientists — serve for free. Several presidential administrations have recognized the unique value of Academy studies and authorized

executive agencies to forego competitive bidding in Academy contracts.[22]

FACA was also intended to address bias and agency capture by interest groups. *See, e.g., Public Citizen*, 491 U.S. at 446; *see also* Hearings on H.R. 4383 before the Subcommittee on Legal and Monetary Affairs of the House Committee on Government Operations, 92nd Cong., 1st Sess. (November 4, 1971) at 14 (statements of Sen. Metcalf) (characterizing advisory committees as "governmentally established and sanctioned trade associations"). Detailed Academy guidelines address potential bias and conflict-of-interest and require screenings in committee before a study begins. If a conflict becomes apparent, the Academy may ask the committee member to resign.

The Academy generally utilizes committees for well defined tasks, not for the open-ended activities Congress sought to correct with FACA. While the Academy has created standing committees that undertake a series of studies, typical Academy committees serve between six and twenty-four months and can accomplish a major study in as little as four months. *See* National Academy of Sciences, et al., *A Unique National Resource* 5 (1994). In the case at bar, the penultimate Guide Review Committee completed its work in 1985 and disbanded. *See Animal Legal Defense Fund v. Shalala*, No. 94-1003, *mem. op.* at 2 (D.D.C. Dec. 20, 1996). The Academy formed the latest Guide Review Committee only when the Academy recognized the need to update the Guide and entered into a funding contract with the sponsoring agencies. *See id.* at 2-3.

---

22 *See, e.g.*, Exec. Order No. 12832, 3 C.F.R. 580 (1993), *reprinted in* 36 U.S.C. 253 n. (1994).

CONCLUSION

For the reasons stated herein, this Court should grant the Petition for a Writ of Certiorari. The Academy process for generating relevant, accurate, and objective studies cannot survive the court of appeals' decision to apply FACA to Academy committees. These committees are an important, but incomplete, part of a process, described fully in this brief, that the Academy has developed over decades to ensure that reports issued by the Academy provide Congress, the federal agencies, the courts, state and local governments, international organizations, and the public with independent, objective guidance on complex scientific and technical questions. The court of appeals' decision to apply FACA to Academy committees rests on dicta that mischaracterize the Academy in FACA's legislative history. By adopting these dicta as binding authority, the court of appeals misapplies the standards established by this Court in *Public Citizen.*

List of Amici Curiae

BETSY ANCKER-JOHNSON, former Assistant Secretary of Science and Technology, Department of Commerce; Member, National Academy of Engineering

PHILIP W. ANDERSON, Professor of Physics, Princeton University; Nobel Laureate in Physics (1977); Member, National Academy of Sciences

KENNETH J. ARROW, Joan Kenney Professor of Economics and Professor of Operations Research Emeritus, Stanford University; Nobel Laureate in Economics (1972); Member, National Academy of Sciences

RICHARD ATKINSON, President, University of California; Member, National Academy of Sciences; Member, Institute of Medicine

NORMAN AUGUSTINE, Chairman, Lockheed Martin Corporation; Member, National Academy of Engineering

PAUL BERG, Robert W. and Vivian K. Cahill Professor in Cancer Research, Stanford University; Nobel Laureate in Chemistry (1980); Member, National Academy of Sciences

J. MICHAEL BISHOP, University Professor and Director, G. W. Hooper Foundation, University of California, San Francisco; Nobel Laureate in Physiology or Medicine (1989); Member, National Academy of Sciences; Member, Institute of Medicine

ERICH BLOCH, Distinguished Fellow, Council on Competitiveness; former Director, National Science Foundation; Member, National Academy of Engineering

NICOLAAS BLOEMBERGEN, Gerhard Grade University Professor Emeritus, Harvard University; Nobel Laureate in Physics (1981); Member, National Academy of Sciences

LEWIS M. BRANSCOMB, Aetna Professor in Public Policy and Corporate Management Emeritus, John F. Kennedy School of Government, Harvard University; former Director, National Bureau of Standards; Member, National Academy of Sciences

D. ALLAN BROMLEY, Sterling Professor of the Sciences and Dean of Engineering, Yale University; former Science Adviser to President Bush; Member, National Academy of Sciences

HERBERT C. BROWN, R.B. Wetherill Research Professor Emeritus, Purdue University; Nobel Laureate in Chemistry (1979); Member, National Academy of Sciences

MICHAEL S. BROWN, Paul J. Thomas Professor of Medicine and Genetics, University of Texas Southwestern Medical Center; Nobel Laureate in Physiology or Medicine (1985); Member, National Academy of Sciences; Member, Institute of Medicine

LEON N. COOPER, Professor of Science, Department of Physics, Brown University; Nobel Laureate in Physics (1972); Member, National Academy of Sciences

E. J. COREY, Sheldon Emery Professor of Chemistry, Harvard University; Nobel Laureate in Chemistry (1990); Member, National Academy of Sciences

DONALD J. CRAM, S. Winstein Professor of Organic Chemistry Emeritus, University of California, Los Angeles; Nobel Laureate in Chemistry (1987); Member, National Academy of Sciences

ROBERT F. CURL, Harry C. and Olga K. Wiess Professor of Natural Sciences, Rice University; Nobel Laureate in Chemistry (1996); Member, National Academy of Sciences

EDWARD E. DAVID, JR., President, EED, Inc.; former Science Adviser to President Richard Nixon; Member, National Academy of Sciences; Member, National Academy of Engineering

GERARD DEBREU, Professor Emeritus of Economics and Mathematics, University of California, Berkeley; Nobel Laureate in Economics (1983); Member, National Academy of Sciences

HANS DEHMELT, Professor, Department of Physics, University of Washington, Seattle; Nobel Laureate in Physics (1989); Member, National Academy of Sciences

JAMES J. DUDERSTADT, President Emeritus and University Professor of Science and Engineering, University of Michigan; Member, National Academy of Engineering

ROBERT J. EATON, Chairman and Chief Executive Officer, Chrysler Corporation; Member, National Academy of Engineering

VAL L. FITCH, James S. MacDonnell University Professor of Physics Emeritus, Princeton University; Nobel Laureate in Physics (1980); Member, National Academy of Sciences

JOHN S. FOSTER, Member, Board of Directors and Consultant, TRW, Inc.; former Director of Defense Research and Engineering, Department of Defense; former Director, Livermore Laboratory; Member, National Academy of Engineering

MARYE ANNE FOX, M. June and J. Virgil Waggoner Regents Chair in Chemistry and Vice President for Research, The University of Texas; Member, National Academy of Sciences

DONALD S. FREDRICKSON, Scholar, National Library of Medicine, National Institutes of Health; former Director, National Institutes of Health; former President, Institute of Medicine; Member, National Academy of Sciences; Member, Institute of Medicine

JEROME I. FRIEDMAN, Professor of Physics, Massachusetts Institute of Technology; Nobel Laureate in Physics (1990); Member, National Academy of Sciences

ROBERT A. FROSCH, Senior Research Fellow, John F. Kennedy School of Government, Harvard University; former Administrator, National Aeronautics and Space Administration; Member, National Academy of Engineering

MURRAY GELL-MANN, Santa Fe Institute; Nobel Laureate in Physics (1969); Member, National Academy of Sciences

ALFRED G. GILMAN, Professor and Chairman, Department of Pharmacology, University of Texas Southwestern Medical Center; Nobel Laureate in Physiology or Medicine (1994); Member, National Academy of Sciences

SHELDON L. GLASHOW, Professor of Physics, Harvard University; Nobel Laureate in Physics (1979); Member, National Academy of Sciences

MARY L. GOOD, former Under Secretary for Technology, U.S. Department of Commerce; Member, National Academy of Engineering

WILLIAM HAPPER, Eugene Higgens Professor of Physics and Chair of the University Research Board, Department of Physics, Princeton University; former Director, Energy Research, Department of Energy; Member, National Academy of Sciences

JOHN C. HARSANYI, Professor Emeritus, Haas School of Business, University of California, Berkeley; Nobel Laureate in Economics (1994); Member, National Academy of Sciences

HERBERT HAUPTMAN, President, Hauptman-Woodward Medical Research Institute; Nobel Laureate in Chemistry (1985); Member, National Academy of Sciences

DUDLEY R. HERSCHBACH, Baird Professor of Science, Harvard University; Nobel Laureate in Chemistry (1986); Member, National Academy of Sciences

ROALD HOFFMANN, Frank M. T. Rhodes Professor of Human Letters, Cornell University; Nobel Laureate in Chemistry (1981); Member, National Academy of Sciences

JEROME KARLE, Chief Scientist, Laboratory for Structure of Matter, Naval Research Laboratory; Nobel Laureate in Chemistry (1985); Member, National Academy of Sciences

HENRY W. KENDALL, J. A. Stratton Professor, Department of Physics, Massachusetts Institute of Technology; Nobel Laureate in Physics (1990); Chairman, Union of Concerned Scientists; Member, National Academy of Sciences

C. EVERETT KOOP, McInerny Professor of Surgery and Senior Scholar, C. Everett Koop Institute at Dartmouth; former Surgeon General of the United States; Member, Institute of Medicine

ARTHUR KORNBERG, Professor Emeritus, Department of Biochemistry, Stanford University; Nobel Laureate in Physiology or Medicine (1959); Member, National Academy of Sciences

WILLIS E. LAMB, JR., Professor of Physics and Optical Science, University of Arizona; Nobel Laureate in Physics (1955); Member, National Academy of Sciences

LEON M. LEDERMAN, Pritzker Professor of Science, Illinois Institute of Technology; Director Emeritus, Fermi National Accelerator Laboratory; Nobel Laureate in Physics (1988); Member, National Academy of Sciences

DAVID M. LEE, Professor, Department of Physics, Cornell University; Nobel Laureate in Physics (1996); Member, National Academy of Sciences

PHILIP R. LEE, Professor Emeritus, School of Medicine, University of California, San Francisco; former Assistant Secretary for Health, U. S. Department of Health and Human Services; Member, National Academy of Sciences; Member, Institute of Medicine

WASSILY LEONTIEF, Professor of Economics, New York University; Nobel Laureate in Economics (1973); Member, National Academy of Sciences

W. CARL LINEBERGER, E. U. Condon Distinguished Professor Chemistry and Biochemistry, University of Colorado; Member, National Academy of Sciences

WILLIAM N. LIPSCOMB, Professor of Chemistry, Harvard University; Nobel Laureate in Chemistry (1976); Member, National Academy of Sciences

JANE LUBCHENCO, Distinguished Professor and Wayne and Gladys Valley Professor of Marine Biology, Oregon State University; Retiring President and Chair of the Board, American Association for the Advancement of Science; Member, National Academy of Sciences

RUDOLPH A. MARCUS, A. A. Noyes Professor of Chemistry, California Institute of Technology; Nobel Laureate in Chemistry (1992); Member, National Academy of Sciences

FRANCO MODIGLIANI, Institute Professor Emeritus, Massachusetts Institute of Technology; Nobel Laureate in Economics (1985); Member, National Academy of Sciences

MARIO J. MOLINA, Martin Professor of Atmospheric Chemistry, Massachusetts Institute of Technology; Nobel Laureate in Chemistry (1995); Member, National Academy of Sciences

DANIEL NATHANS, University Professor of Molecular Biology, Johns Hopkins University School of Medicine; Nobel Laureate in Physiology or Medicine (1978); Member, National Academy of Sciences

GEORGE A. OLAH, Professor of Chemistry, University of Southern California; Nobel Laureate in Chemistry (1994); Member, National Academy of Sciences

DOUGLAS D. OSHEROFF, Professor, Department of Physics, Stanford University; Nobel Laureate in Physics (1996); Member, National Academy of Sciences

GEORGE E. PALADE, Dean of Scientific Affairs and Professor of Cellular and Molecular Medicine, University of California School of Medicine; Nobel Laureate in Physiology or Medicine (1974); Member, National Academy of Sciences; Member, Institute of Medicine

ARNO A. PENZIAS, Vice President and Chief Scientist, Bell Laboratories, Lucent Technologies; Nobel Laureate in Physics (1978); Member, National Academy of Sciences; Member, National Academy of Engineering

MARTIN L. PERL, Professor of Physics, Stanford University; Nobel Laureate in Physics (1995); Member, National Academy of Sciences

WILLIAM J. PERRY, Michael and Barbara Berberian Professor of Engineering-Economic Systems and Operations Research, Stanford University; former Secretary of Defense; Member, National Academy of Engineering

THOMAS D. POLLARD, President and Chief Executive Officer, The Salk Institute; Member, National Academy of Sciences

FRANK PRESS, Principal, The Washington Advisory Group; former Science Adviser to President Carter; former President, National Academy of Sciences; Member, National Academy of Sciences

NORMAN RAMSEY, Professor of Physics, Harvard University; Nobel Laureate in Physics (1989); Member, National Academy of Sciences

ROBERT C. RICHARDSON, F. R. Newman Professor of Physics, Cornell University; Nobel Laureate in Physics (1996); Member, National Academy of Sciences

BURTON RICHTER, Director, Stanford Linear Accelerator Laboratory and Paul Pigott Professor in the Physical Sciences, Stanford University; Nobel Laureate in Physics (1976); Member, National Academy of Sciences

F. SHERWOOD ROWLAND, Donald Bren Research Professor, University of California; Nobel Laureate in Chemistry (1995); Foreign Secretary, National Academy of Sciences

PAUL A. SAMUELSON, Institute Professor Emeritus, Massachusetts Institute of Technology; Nobel Laureate in Economics (1970); former Member, Council of Economic Advisers; Member, National Academy of Sciences

ARTHUR L. SCHAWLOW, Jackson-Wood Professor Emeritus, Stanford University; Nobel Laureate in Physics (1981); Member, National Academy of Sciences

GLENN T. SEABORG, Associate Director-at-Large, Lawrence Berkeley National Laboratory, University of California; Nobel Laureate in Chemistry (1951); former Director, Atomic Energy Commission; Member, National Academy of Sciences

PHILLIP A. SHARP, Professor and Head of the Center for Cancer Research, Massachusetts Institute of Technology; Nobel Laureate in Physiology or Medicine (1993); Member, National Academy of Sciences

CLIFFORD G. SHULL, Professor of Physics (retired), Massachusetts Institute of Technology; Nobel Laureate in Physics (1994); Member, National Academy of Sciences

HERBERT A. SIMON, Professor of Computer Science and Psychology, Carnegie Mellon University; Nobel Laureate in Economics (1978); Member, National Academy of Sciences

RICHARD E. SMALLEY, Gene and Norman Hackerman Professor of Chemistry, and Professor of Physics, Rice University; Nobel Laureate in Chemistry (1996); Member, National Academy of Sciences

ROBERT M. SOLOW, Institute Professor Emeritus, Massachusetts Institute of Technology; Nobel Laureate in Economics (1987); Member, National Academy of Sciences

H. GUYFORD STEVER, President Emeritus, Carnegie Mellon University; former Science Adviser to President Gerald Ford; former Director, National Science Foundation; Member, National Academy of Sciences; Member, National Academy of Engineering

HENRY TAUBE, Professor of Chemistry, Stanford University; Nobel Laureate in Chemistry (1983); Member, National Academy of Sciences

JOSEPH H. TAYLOR, JR., James S. McDonnell Distinguished University Professor of Physics, Princeton University; Nobel Laureate in Physics (1993); Member, National Academy of Sciences

JAMES TOBIN, Professor of Economics Emeritus, Yale University; Nobel Laureate in Economics (1981); former Member, Council of Economic Advisers; Member, National Academy of Sciences

CHARLES H. TOWNES, Professor, Department of Physics, University of California, Berkeley; Nobel Laureate in Physics (1964); Member, National Academy of Sciences

CHARLES M. VEST, President, Massachusetts Institute of Technology; Member, National Academy of Engineering

JAMES D. WATKINS, President, Consortium for Oceanographic Research and Education; former

Secretary of Energy; former Chief of Naval Operations

STEVEN WEINBERG, Professor of Science, Department of Physics, University of Texas; Nobel Laureate in Physics (1979); Member, National Academy of Sciences

TORSTEN N. WIESEL, President, The Rockefeller University; Nobel Laureate in Physiology or Medicine (1981); Member, National Academy of Sciences; Member, Institute of Medicine

ROBERT W. WILSON, Senior Scientist, Smithsonian Astrophysical Observatory, Harvard University; Nobel Laureate in Physics (1978); Member, National Academy of Sciences

JAMES B. WYNGAARDEN, Professor Emeritus, Duke University; former Director, National Institutes of Health; Member, National Academy of Sciences; Member, Institute of Medicine